STATE OF MICHIGAN

COURT OF APPEALS

BOARD OF TRUSTEES OF THE POLICEMEN/FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff-Appellee,

v

CITY OF DETROIT, a municipal corporation; KWAME M. KILPATRICK, Mayor; SEAN K. WERDLOW, Chief Financial Officer/Finance Director; CLARENCE WILLIAMS, Treasurer, and CITY COUNCIL OF THE CITY OF DETROIT,

Defendant-Appellants.

UNPUBLISHED
June 2, 2005

No. 253343
Wayne Circuit Court
LC No. 03-321552-CK

BOARD OF TRUSTEES OF THE POLICEMEN/FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff-Appellee,

v

CITY OF DETROIT, a municipal corporation; KWAME M. KILPATRICK, Mayor; SEAN K. WERDLOW, Chief Financial Officer/Finance Director; CLARENCE WILLIAMS, Treasurer, and CITY COUNCIL OF THE CITY OF DETROIT,

Defendant-Appellants.

No. 260069
Wayne Circuit Court
LC No. 04-422445-CZ

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by right the orders of the trial court granting plaintiff's motions for summary disposition. We affirm.

Plaintiff, the Board of Trustees of the Policemen/Firemen Retirement System of the City of Detroit, filed complaints against defendants after defendant city failed to make its annual contributions to the retirement system. Defendant city ultimately contributed $34,968,579.59 less to the retirement system than plaintiff had certified for fiscal year 2002-2003 and $9,788,774.86 less for fiscal year 2003-2004.

Defendants assert that the trial court erred in determining that MCL 38.1140m does not apply to the employer contributions made in 2003 and 2004. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition under MCR 2.116(C)(10) is appropriately granted if there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Id.* The applicability of a statute is a question of law that this Court reviews de novo, *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004), as is statutory interpretation, *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915(2001).

Defendants argue that MCL 38.1140m, effective December 30, 2002, applies prospectively to both contributions at issue because the contributions were *paid* in 2003 (for the 2002-2003 fiscal year) and 2004 (for the 2003-2004 fiscal year). However, the plain language of MCL 38.1140m provides the manner in which the governing board is to determine the employer contribution. Specifically, the statute mandates what an employer contribution must include, how an employer contribution amount is determined, and what action is required of the governing board and actuary in making this determination. The statute does not address when contributions are to be made. The statute thus provides that from its effective date forward, the employer contribution shall be determined in the manner described in the statute. Conversely, then, for determinations made before December 30, 2002, defendant city's code provisions and city charter control and provide plaintiff with greater authority in determining the contribution (see *infra*).

Because in both Docket No. 253343 and Docket No. 260069[1] the contribution rates at issue were apparently determined before the effective date of MCL 38.1140m, the statute does not apply to either contribution. That being the case, the applicable city code and charter provisions, which predate the effective date of the statute, govern how the contributions are to be determined and plaintiff's role and authority in making that determination.

Defendants assert that under the city code and charter, plaintiff *must* fully credit funding contributions made to the now overfunded retirement plan. We disagree.

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[1] A review of the record indicates that the actuary based his calculations on data as of June 30, 2002.

When interpreting a statute, the Legislature is presumed to have intended the meaning it plainly expressed. *Huggett, supra* at 717. If the plain and ordinary meaning of the language is clear, judicial construction is not usually necessary or permitted. *Id.*

Plaintiff board cites two specific provisions of defendant city's code, §§ 54-2-7 and 54-43-4, in support of its argument that defendant city must pay the contribution as set by plaintiff. The provisions provide:

> Sec. 54-2-7. Board of trustees to compute city's annual contribution.
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> Based upon the provisions of this article, including any amendments, the *board of trustees shall compute* the city's annual contributions, *expressed as a percent* of active member compensations, to the retirement system for the fiscal year beginning July 1, 1975, using actuarial valuation data as of June 30, 1974, and for each subsequent fiscal year using actuarial valuation data as of the June 30th date which date is a year and a day before the first day of such fiscal year. The board shall report to the mayor and to the city council the contribution percents so computed, and *such contribution percents shall be used in determining the contribution* dollars to be appropriated by the city council and paid to the retirement system. For each fiscal year beginning July 1, 1975 and each fiscal year thereafter, *such contribution dollars shall be determined by multiplying the applicable contribution percent for wuch [sic] fiscal year by the member compensations paid for such fiscal year*; provided for the one fiscal year beginning July 1, 1975 and ending June 30, 1976 such member compensations so used shall not exceed 106.09 percent of the active members' annual compensations used in the actuarial valuation determining such contribution percent. [Emphasis added.]
>
> Sec. 54-43-4. Contributions to any payments from pension accumulation fund.
>
> Except as provided re the survivors benefit fund, the pension accumulation fund shall be the fund in which shall be accumulated reserves for the pensions and other benefits payable from contributions made by the city, and from which transfers shall be made as provided in this section. Contributions to and payments from the pension accumulation fund shall be made as follows:
>
> (a) Upon the basis of such assumptions as to future financial experiences as the board of trustees shall from time to time adopt, *the actuary shall annually compute the city's contribution, expressed as a percent of active member contributions*, to provide the pension reserves covering the pensions or other city-financed benefits to which members might be entitled or which might be payable at the time of their discontinuances of city employment; provided, such contribution percents shall not be less than amounts which, expressed as percents of active member compensations, will remain level from generation to generation of Detroit citizens. Upon the retirement or death of a member, the pension reserve for any benefits payable on his behalf shall be transferred from the pension accumulation fund to the pension reserve fund, to the extent of there being assets in the pension accumulation fund.

(b) *The board of trustees shall annually ascertain and report to the mayor and the council the amount of contributions due the retirement system by the city, and the council shall appropriate and the city shall pay such contributions to the retirement system during the ensuing fiscal year*. When paid, such contributions shall be credited to the pension accumulation fund. [Emphasis added.]

The emphasized portions of the above code provisions clearly state that plaintiff board shall determine defendant city's contribution rate based on actuarial figures, communicate this percent figure to defendant city, that this percent figure "shall" be used in determining the dollar amount of the contribution after which the city council "shall" appropriate and the city "shall" pay such contributions. The word "shall" is generally used to designate a mandatory provision. *Old Kent Bank v Kal Kustom, Inc,* 255 Mich App 524, 532; 660 NW2d 384 (2003).

Defendants, however, assert that plaintiff's argument that the above provisions create a financial obligation renders the provisions in conflict with the 1997 city charter, which allows the city council discretion to appropriate and the mayor to spend funds. Defendants cite sections 8-203, 8-209, and 8-302 of the charter regarding defendant city's annual budget, budget adoption and limitations on obligations and payments for support of its argument concerning the city council's discretion to appropriate and, also, *City Council for the City of Detroit v Young*, 449 Mich 670; 537 NW2d 177 (1995), for the premise that the mayor can then spend less than the council appropriates. But, defendants' reliance on the charter sections cited above ignores article 11 of the city charter which specifically addresses the retirement plan. Section 11-101 states that the benefits provided by the plan, "being contractual obligations of the city, shall in no event be diminished or impaired." Section 11-102 incorporates by reference the retirement plan into the charter. Furthermore, while *Young, supra* at 672, concerns a mayor's cutting expenditures without the city council's prior approval, the mayor in that case did so by implementing a hiring freeze, reducing overtime, and delaying certain purchases, etc. It did not involve a scenario where a mayor refused to satisfy an already existing obligation. Defendants' argument fails to consider that defendant city is contractually obligated to fund the retirement system, and the code provisions, incorporated into the charter, provide that plaintiff board determine the appropriate contribution rate and requires defendant city to make the resulting dollar contribution. Here, the actuary provided the contribution rate which was calculated "using generally accepted actuarial principles and in accordance with standards of practice prescribed by the Actuarial Standards Board."[2]

Defendants further argue that the provisions plaintiff cites must be harmonized with the provision concerning annual interest and that this requires that the full funding credit be given when the plan is overfunded. The annual interest provision provides:

Sec. 3. Annual interest.

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[2] December 26, 2002, cover sheet letter from Gabriel, Roeder, Smith & Company, Consultants & Actuaries.

> The Board of Trustees annually shall allow regular interest on the mean amount of assets in each of the funds for the preceding year. The amount so allowed shall be due and payable to said funds, and shall be annually credited thereto by the Board of Trustees from interest and other earnings on moneys of the system. Any additional amount, required to meet the regular interest on the funds of the System, shall be paid by the City and *any excess of earnings, over such amount required, shall be a portion of the amounts to be contributed by the city*. [Emphasis added.]

We agree with plaintiff's argument that this provision deals specifically with the treatment of annual interest in a given year and does not constitute a general requirement that a full funding credit be given when the system is overfunded. Furthermore, nothing in the record indicates why the plan is overfunded. Perhaps, for example, the plan earned excess interest in either of the years in question.

According to defendant city's code provisions and charter, plaintiff board determines the contribution rate based on actuarial data and reports. Nothing in the provisions mandates that plaintiff board give defendant city a full funding credit, any such credit appears to be clearly a matter of discretion. Indeed, it appears that the charter incorporates the language of Const 1963, art 9, § 24, which reflects a concern that the retirement system be properly funded. Therefore, under defendant city's code provisions and city charter, it is plaintiff board that has discretion regarding any credit, not defendants.[3]

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Michael J. Talbot

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[3] We note, however, this discretion is limited following the enactment of MCL 38.1140m, effective December 30, 2002. This statute will apply to future employer contribution rates, and, pursuant to the statute, plaintiff must act in accordance with the actuary's recommendation.